(1)

Supreme Court, U.S.
FILED

051407 APR 27 2006

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No.

IN THE

Supreme Court of the United States

LUIS A. HIGUIT,

Petitioner

v.

ALBERTO R. GONZALES,
United States Attorney General

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether or not the Court of Appeals has jurisdiction over Petitioner's challenge to the denial of his adjustment of status under the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231, 302-23 because the determination that Petitioner is a persecutor or has engaged in persecutorial activities is a question of law or a legal claim that should have been addressed by the 4th Circuit Court of Appeals for purposes of exercising jurisdiction.

Whether or not Petitioner who is a military officer of the Philippine government and performs legitimate and regular military intelligence gathering duties and functions against terrorists who advocate the violent overthrow of the duly constituted government is a persecutor or is engaging in persecutorial activities under the purview of statutory and regulatory definition or as construed in accordance with judicial case law developed interpreting other persecution provisions contained in the INA, making him expressly ineligible for asylum or withholding of removal under 8 U.S.C.A. 1158(b)(2)(A)(i), 8 C.F.R. 1208.169(d)(2).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT WITH REQUEST FOR STAY OF REMOVAL

Luis A. Higuit ("petitioner" hereafter) prays that this Court review on certiorari the judgment of the United States Court of Appeals, for the Fourth Circuit, which dismiss the appeal in part and affirm the judgment of the Board of Immigration Appeals in part.

DECISION BELOW

The published opinion dismissing the Petition for Review and the Petition for Rehearing by the United States Court of Appeals , Fourth Circuit is set out in the Appendix, at 1a-10a.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit. , dismissed the Petition for Review in part and affirm the judgment of the Board of Immigration Appeals in part on January 3, 2006 and on February 28, 2006 denied rehearing. Appendix 8a. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S . Const. Amend. V

* * *

No person shall be deprived of life, liberty without due process of law.

STATUTE INVOLVED

Real ID Act of 2005, Pub. L. No. 109-13, Div.B
119 Stat. 231, 302-23
8 U.S.C. 1252(a)(2)(D)

Nothing in subparagraph (B)..... which eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of appeals in accordance with this section.

8 U.S.C.A. 1158(b)(2)(A)(i)

Asylum is unavailable where "the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in particular social group, or political opinion.

STATEMENT OF THE CASE

Petitioner is a Philippine national who entered the United States under a nonimmigrant visa on May 16, 1990. He was a former officer of the Philippine Constabulary , a military branch originally set up and organized by the U.S government in 1902 when the Philippines was then considered as a semi-colony of the United States. The Philippine Constabulary is tasked of defending the duly constituted authorities against communists or terrorists poised to overthrow it by armed and violent means. Petitioner overstayed his visa and the Immigration and Naturalization Service (now the Department of Homeland Security) sought his removal. Higuit conceded removability and as a relief from removal applied for Political asylum and withholding of removal under the Convention Against Torture (CAT) based on a well-grounded fear of persecution on account of his work as intelligence operative.

In the individual hearing of October 15, 1999, the immigration judge (IJ) denied his principal relief for Asylum and withholding of removal under the Convention Against Torture (CAT) and granted him voluntary departure. The Immigration Judge found petitioner ineligible for asylum and withholding of removal under 8 U.S.C.A. 1158(b)(2)(A)(i): any alien who "ordered, incited, assisted , or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. The Immigration Judge solely

based his denial on the statement made by Petitioner in his own hand writing on the asylum application , Form I-589 in Question no.2, which he admitted that "because of his loyalty to the Marcos group and to the Military Establishment, I hurt so many people, ruin their career , some were imprisoned, and sometimes causes death to some others who are suspected to be leftist organization." On the same asylum application, Petitioner in his own handwriting likewise explained that: " I was a member of the Military (Philippine Constabulary) and I worked in the Intelligence unit. My job is to gather information of individual or organization of their activities, crime syndicates, anti-Marcos and groups who wants to overthrow the government thru infiltration and surveillance. We are allowed to work anywhere and any kind of job even outside the country, as long as we get in touch with our higher officers." Petitioner during his direct testimony and while in cross-examination in response to the said paragraph where Petitioner admitting "hurting so many people...", Higuit was never involve directly or indirectly in the infliction of physical harm . In fact , all this statements in the asylum application including his explanations of said main statement relied by the Immigration Judge as basis of his ineligibility is actually a rational and logical explanation of how he worked in the intelligence unit. Clearly, Petitioner was actually explaining and describing his main job of gathering information on individuals and organization by infiltration and surveillance. His work stops there. Petitioner later came to know how his so called intelligence reports and data gathering have been used by the military and the police in arresting suspected communists which led to their torture and sometimes summary execution. Petitioner who is engaged in legitimate combat activity is not a member of a group that persecutes. He is a military officer. Higuit was earmarked for liquidation and summary execution by the

New People's Army, a group designated by the U.S government as terrorist because his intelligence and surveillance reports which he submitted to his superiors were utilized to arrest suspected communists and terrorist during the Marcos dictatorship. There was no evidence or proof that Petitioner has been indicted or convicted of any human rights crime. Despite the absence of any evidence to support that Petitioner is a persecutor or is engaged in persecution, the Immigration Judge denied his political asylum and withholding of removal.

Petitioner appealed and sought review of the Immigration Judge's decision to the Board of Immigration Appeals. During the pendency of his appeal, the Board granted Petitioner's Motion for a remand to the Immigration Judge for consideration of his application for adjustment of status based on an approved labor certification and immigrant petition filed by his employer. The Immigration Judge in the remand hearing again denied Petitioner's application for adjustment of status to become permanent resident of the United States based on discretionary ground i.e since petitioner has been found ineligible for asylum because allegedly he has engaged in persecutorial activities as a military intelligence officer and is considered as an individual classified as a persecutor, his application to become permanent resident of the United States is being denied as a matter of discretion. Higuit submitted countervailing evidence that he was married, had a U.S Citizen child, owned substantial property in this country and was active in a church organization. Despite these positive factors, the Immigration Judge denied him the adjustment of status application because his good conduct did not outweigh his participation as alleged persecutor during the Marcos regime. Higuit brought his case once more to the Board of

Immigration Appeals and the Board without articulating the basis of their decision simply adopted and affirmed the Immigration Judge's decision denying the adjustment of status application.

A Petition for Review was filed on January 4, 2005 at the U.S. Court of Appeals Fourth Circuit. Petitioner and Respondent submitted their briefs for consideration. Subsequently with the REAL ID ACT in effect, Petitioner and Respondent were requested to submit supplemental briefings on whether or not the Court of Appeals has jurisdiction over Petitioner's challenge to the denial of adjustment of status under the Real ID Act of 2005. The case was orally argued before the United States Court of Appeals on December 1, 2005. The Court of Appeals in a published opinion dated January 3, 2006 dismissed the appeal relating to the IJ's denial of adjustment of status application of Petitioner as affirmed by the Board of Immigration Appeals, for lack of jurisdiction under the new REAL ID ACT. But reviewed the BIA's decision affirming the IJ's denial of asylum and withholding of removal. The Court of Appeals in the same legal framework that supports the basis for petitioner's denial of his adjustment of status application on discretionary ground i.e he being a persecutor or has assisted in the persecution of others likewise denied the asylum application and withholding of removal of Petitioner because he is found to have engaged in persecutorial activities making him ineligible as a qualified asylee or refugee in the United States.

On February 28, 2006, the U.S Court of Appeals denied Petitioner's petition for rehearing. Appendix 8a.

On this date of filing of this instant Petition for Writ of Certiorari. Petitioner was placed in DHS custody be virtue of his arrest by the ICE on April 20, 2006 and is presently detained at Howard County Jail Jessup.Maryland.

REASON FOR GRANTING THE WRIT

The U.S Court of Appeals Decision is in conflict with the Fifth Amendment of the U.S. Constitution and the legally pronounced expanded jurisdiction of the Court of Appeals under the Real I.D Act of 2005

The Real ID Act of 2005, (Act) Pub.L. 109-13, 119 Stat. 231 expanded the availability of Court of Appeals Review. Specifically, section 106(a)(1) of the REAL ID ACT amended INA 242 to include a new section INA 242(a)(2)(D) which states:

> (D) JUDICIAL REVIEW OF CERTAIN CLAIMS. - Nothing in subparagraph (B) or (C) , or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

Petitioner's characterization on whether or not he is a persecutor involves a question of law and a legal claim for which the REAL ID Act allows the Court of Appeals to

review the denial of Higuit's adjustment of status application to become permanent resident of the United States. While it appears that his application for adjustment of status based on an approved I-140 Immigrant Worker Petition is being denied on discretionary ground, the reality is that his application is being denied solely upon the construction on whether or not Petitioner is a persecutor or has assisted in the persecution of others during the Marcos regime which is a bar in adjustment of status. The only evidence presented to support the claim that Higuit is a persecutor which makes him statutorily ineligible to adjust and become a permanent resident of the United States is his handwritten statement in his asylum application which he claimed he hurt so many people because in performing his regular and normal duties as an intelligence gatherer of the military, his information and data were wrongly utilized by the military and those in the barracks which led to the arrests , torture and even summary execution of terrorists and suspected communists during the Marcos regime. What does Petitioner got to do with the torturing soldiers and military scalawags who on their own volition and action failed to observe the minimum requirements of due process and observe fundamental basic human rights of those arrested as a result of the intelligence gathering made by Petitioner. The torture and excesses committed by the soldiers at the Abu Gharib Prisons were not the result of the intelligence and data gathered by U.S Military men leading to the arrests of these suspected terrorists who are in the Abu Gharib Prison . To hyper extend culpability and liability of physical torturers and those who engaged in atrocities to include even those who with patriotism engage in intelligence gathering of suspected terrorists not only cause great dishonor to these type of soldiers and their superiors who are doing their job under the constitution to protect the nation and our democracy, but

create a chaotic state in the governance of a nation and its people.

Petitioner as an intelligence operative explained in details how he performs his duties. He engaged in lawful surveillance and infiltration. Petitioner became remorseful upon learning that his intelligence data has been used by soldiers to torture and inflict physical harm even causing deaths to those who were arrested as a result of the dossiers he provided them. Petitioner is fully aware that these intelligence reports will be utilized by soldiers in the field to legitimately and lawfully arrest suspected terrorists and communists. Petitioner's accountability as a military intelligence gatherer should not be extended to acts of his fellow soldiers for which he has no control at all. Further, the language of the statute and the intent of the legislation demonstrates that active personal involvement in persecutorial acts needs to be demonstrated before deportability may be established and that the government provide proof of personal active assistance or participation in persecutorial acts. See Laipenieks v. INS.750 F.2d 1427 (9th Cir. 1985).

The military establishment as a whole under the Marcos regime is not a prima facie group that persecutes like the Nazis. The military establishment of any government is under a constitutional duty to protect the republic and the nation. But if individual soldiers and military personnel commit human rights violations and excesses, then they should be held accountable and culpable on their own actions. There may be some soldiers that actually persecutes, torture and inflict physical harm to terrorists and suspected terrorists. But these isolated acts should not be an indictment of the entire military establishment and should not be

extended as a criminal or human rights violation of a soldier whose main responsibility is simply to gather and obtain intelligence data of terrorists and suspected terrorists. Petitioner simply performed his duty according to the established norms and procedures for intelligence gathering.

Petitioner is advancing a constitutional claim. For the outcome of his adjustment of status application to become a permanent resident is solely dependent on the issue of his characterization as a persecutor. This legal question presents a grave and serious constitutional and legal claim concerning petitioner's liberty and in presenting the appropriate immigration relief to protect his liberty. Petitioner's denial of adjustment of status is not really a review of an unfavorable exercise of the Attorney General's discretion. The legal issue is will Petitioner's eligibility or ineligibility for discretionary relief for adjustment of status or the outcome of his case depends on the interpretation of whether his act or acts constitute under the law as persecutorial acts or that will make him disqualified as an individual engaged in the persecution , assisting or aiding in the persecution of any person on account of race, religion, nationality , membership in a particular social group or political opinion. Eventually, this boils down to statutory construction of who is a persecutor under 8 U.S.C.A 1158(b)(2)(A)(i) and 1231 (b)(3)(B)(i) 8 C.F.R. 1208.16 . Hence, this is a question of law for which the U.S Court of Appeals should have exercised jurisdiction under the Real ID Act.

Petitioner's application for asylum and withholding of removal as relief from removal are also being denied based on the sole legal issue and legal question of whether or not Higuit's actions in the Philippines met the statutory and regulatory definitions of "persecution" or persecutorial acts.

Petitioner is asserting his request for stay of removal from the United States consistent with Petitioner's due process rights under the Fifth Amendment of the Constitution. Petitioner has a nine year old U.S. Citizen daughter who requires his care and supervision. Likewise, Petitioner is still recuperating from his heart ailment as a result of his recent heart attack. The stay of removal under the circumstances and predicated on the humanitarian and legal issues raised is warranted in this instant case.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court review on **certiorari** the judgment of the United States Court of Appeals for the Fourth Circuit vacating and reverse the judgment thereby, consequently granting Petitioner's relief for Adjustment of Status to become lawful permanent resident of the United States and or in the alternative grant his asylum application and withholding of removal under the Convention Against Torture. Petitioner further requests for stay of removal from the United States pending this petition for writ of certiorari and he be released on recognizance to ISAP (Intensive Supervision Appearance Program) of the ICE and for such other relief consistent with the certiorari petition.

Respectfully submitted.

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APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

LUIS A. HIGUIT,
Petitioner,

v.

ALBERTO R. GONZALES,
Attorney General,
Respondent

No. 05-1002

On Petition for Review of a Final Order of
the Board of Immigration Appeals
(A71-792-749)

Argued: December 1, 2005

Decided: January 3, 2006

Before WIDENER, WILKINSON, and TRAXLER,
Circuit Judges.

Dismissed in part and affirmed in part by published opinion. Judge Wilkinson wrote the opinion, in which Judge Widener and Judge Traxler joined.

COUNSEL

ARGUED: Arnedo Silvano Valera, Fairfax, Virginia, for Petitioner. Bryan Stuart Beier, UNITED STATES DEPARTMENT OF JUSTICE, Office of Immigration Litigation, Washington, D.C., for Respondent. **ON BRIEF:** Anna Mills Wagoner, United States Attorney, John W. Stone, Jr., Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greensboro, North Carolina, for Respondent.

OPINION

WILKINSON, Circuit Judge:

Luis A. Higuit challenges a Board of Immigration Appeals decision denying adjustment of status, asylum, and withholding of removal. We hold that because Higuit raises no constitutional claim or question of law on appeal, we lack subject matter jurisdiction to review his denial of adjustment of status. REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a)(1)(A)(iii), 119 Stat. 231, 310 (to be codified as 8 U.S.C. § 1252(a)(2)(D)). With respect to asylum and withholding of removal, the immigration judge properly determined that Higuit was ineligible for relief because he had engaged in persecution as an intelligence operative for the Marcos regime in the Philippines. We therefore dismiss in part and affirm in part.

I.

Petitioner Luis Higuit is a native of the Philippines who entered the United States in May 1990 on a nonimmigrant visa. Higuit overstayed his visa and the Immigration and Naturalization Service (now the Department of Homeland Security) sought his removal. *See* 8 U.S.C.A. § 1227(a)(l)(B) (West 2005). Higuit acknowledged removability, but applied for relief on the basis of asylum and withholding of removal under the Immigration and Nationality Act, 8 U.S.C.A. § § 1158(a)(1), 1231(b)(3), and the Convention Against Torture (CAT), *see* 8 C.F.R: § 208.16(c) (2005).

In a hearing on October 15, 1999, the immigration judge (IJ) denied these requests for relief. According to the IJ, Higuit was ineligible for asylum and withholding of removal because, inter alia, the relevant statutory and regulatory provisions foreclosed such relief for any alien who "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C.A. § 1158(b)(2)(A)(i); *see also id.* 1231(b)(3)(B)(i); 8 C.F.R. § 1208.16(d)(2).

The IJ found that Higuit met this definition because of his approximately ten years of service as an intelligence officer in the repressive Ferdinand Marcos government in the Philippines. Through covert information-gathering, infiltration, and surveillance techniques, Higuit provided his superiors with intelligence on the leftist New People's Army (NPA) and other anti-Marcos communist groups. His asylum

application stated that "[b]ecause of my loyalty to the Marcos group and to the Military Establishment, I hurt so many people" and ruined careers, and furthermore, that individuals he investigated were imprisoned and killed. Higuit testified to the same. The IJ determined that while Higuit had never personally inflicted physical harm, he was ineligible for asylum and withholding of removal because his intelligence activities led to the persecution of NPA members and other anti-government dissidents, including individuals who were only suspected of maintaining ties to communist organizations. The IJ did, however, grant Higuit's application for voluntary departure.

Higuit sought review in the Board of Immigration Appeals (BIA), but during the pendency of his appeal requested a remand to the IJ for consideration of a discretionary adjustment of status, in light of his receipt of an approved Alien Worker petition. *See 8 U.S.C. § 1255(i).* The BIA remanded the case to the IJ for further proceedings. The parties agreed that Higuit was statutorily eligible for an adjustment of status, and that the determinative question was whether he deserved a favorable exercise of discretion. *See Elkins v. Moreno, 435 U.S. 647, 667-68 (1978)* (describing the balancing of equities in adjustment of status determinations).

Higuit submitted evidence that he was married, had a child born in the United States, owned property in this country, and was active in a church organization. On July 31, 2003, the IJ determined that these positive factors did not tip the balance in favor of Higuit, due to his persecution activities in the Philippines. The IJ noted that while an alien who engaged in persecution was not

barred from receiving an adjustment of status. Higuit's estimable conduct in the United States did not outweigh his participation in the Marcos regime.

Higuit renewed his appeal to the BIA, which adopted and affirmed the IJ's decisions denying adjustment of status, asylum, and withholding of removal. Higuit filed a timely appeal.

II.

We first address the denial of adjustment of status. An adjustment of status is a discretionary decision committed to the Attorney General. *See* 8 U.S.C.A. § 1255(i); *see also Okpa v.* INS, 266 F.3d 313, 315 (4th Cir. 2001) (per curiam). Notwithstanding an alien's unlawful immigration classification, the Attorney General may adjust an alien's status to that of a lawful permanent resident if, inter alia, the alien is physically present in the United States, is admissible for permanent residence, and is eligible to receive an immigrant visa, which must be immediately available. *See* 8 U.S.C.A. § 1255(i). Prior to May 2005, it was clear that we lacked jurisdiction to review such a determination. At that time, 8 U.S.C. § 1252(a)(2)(B)(i) (2000) provided that courts do not have jurisdiction to review "any judgment regarding the granting of relief under section...1255 [adjustment of status]." *See also Velasquez-Gabriel v. Crocetti*, 263 F.3d 102, 104 n.1 (4th Cir. 2001).

On May 11, 2005, however, Congress enacted the REAL ID Act. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231, 30223. The relevant provisions of the Act apply retroactively, and as a result to this appeal. § 106(b), 119 Stat. at 311; *Papageorgiou v. Gonzales*, 413 F.3d 356,

358 (3d Cir. 2005). As applicable here, the REAL ID Act added a new subsection (D) to the judicial review provisions in the Immigration and Nationality Act. Subsection (D) states: "Nothing in subparagraph (B) ... which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." 8 U.S.C. § 1252(a)(2)(D). Subsection (B)'s jurisdiction-stripping default remained unchanged, but was revised to indicate that courts lacked jurisdiction "except as provided in subparagraph (D)." Id § 1252(a)(2)(B). In effect, therefore, the REAL ID Act confers upon courts of appeal a narrowly circumscribed jurisdiction to resolve constitutional claims or questions of law raised by aliens seeking discretionary relief. *See Ohioha v. Gonzales*, No. 04-2253, slip op. at 4 n.3 (4th Cir. Dec. 8, 2005); *Hamdan v. Gonzales*, 425 F.3d 1051, 1057 (7th Cir. 2005).

Under this framework, we lack jurisdiction to review the IJ's denial of adjustment of status. Higuit does not advance any constitutional claims. Nor is there any question that he meets the statutory prerequisites for an adjustment of status, *see* 8 U.S.C.A. § 1255(i), as both parties agree that he has. Instead, Higuit submits that he has raised a question of law because the IJ determined that the persecution he carried out in the Philippines outweighed his commendable conduct in the United States. Specifically, he contends that he was denied adjustment of status because the IJ had already determined that he was barred from receiving asylum or withholding of removal on the basis of his persecution activities.

This does not present a question of law. In making the discretionary adjustment of status

determination, the IJ balanced Higuit's positive and negative attributes and did not rule in Higuit's favor. The IJ relied upon Higuit's participation in the Marcos regime, but specifically noted that Higuit was not precluded from receiving an adjustment of status because he had engaged in persecution activities that would bar asylum and withholding of removal. Whether Higuit's actions in the Philippines met the statutory and regulatory definitions of "persecution" was therefore neither relevant to nor dispositive of the IJ's ultimate adjustment of status determination, which was an equitable determination based on factual findings rather than a question of law.

"[T]he REAL ID Act reflects a congressional intent to preserve [a] broad effort to streamline immigration proceedings and to expedite removal while restoring judicial review of constitutional and legal issues." *Grass v. Gonzales*, 418 F.3d 876, 879 (8th Cir. 2005). Were Higuit correct that he has presented a question of law, almost every decision denying discretionary relief would henceforth be subject to judicial review. We are not free to convert every immigration case into a question of law, and thereby undermine Congress's decision to grant limited jurisdiction over matters committed in the first instance to the sound discretion of the Executive. A constitutional claim or question of law may be embedded in a denial of adjustment of status such that it presents a proper issue for appellate court resolution, but that is plainly not the situation here.

III.

We now turn to the BIA's decision affirming the IJ's denial of asylum and withholding of removal. We have jurisdiction to consider these orders. 8 U.S.C.A. § 1252(a)(1), (a)(2)(B)(ii), and review legal questions de novo. *Blanco de Belbruno v. Ashcroft*, 362 F.3d 272, 278 (4th Cir. 2004).

Congress has specifically instructed that aliens who have engaged in persecution are expressly ineligible for asylum or withholding of removal. See *Bah v. Ashcroft*, 341 F.3d 348, 351 (5th Cir. 2003) (per curiam). Asylum is unavailable where "the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C.A. § 1158(b)2)(A)(i); *see* also id. § 1231(b)(3)(B)(i) (setting forth virtually identical persecution exception for withholding of removal under the Immigration and Nationality Act); 8 C.F.R. § 1208.16(d)(2) (same for withholding of removal under the CAT). If there is evidence that the alien engaged in persecution, he must prove by a preponderance of the evidence that he is not barred from relief on this ground. *See id.* §§ 208.13(a), 208.16(d)(2), 1208.16(d)(2); *see also Hernandez v. Reno*, 258 F.3d 806, 812 (8th Cir. 2001).

Higuit argues that he did not engage in persecution because in the course of his military intelligence-gathering activities, he never physically tortured or harmed any person. We do not believe the statutory language defines persecution so narrowly. Congress expressly precluded the relief he seeks for any alien who "ordered, incited, *assisted*, or *otherwise participated* in" persecution. 8 U.S.C.A. §§ 1158(b)(2)(A)(i)

1231(b)(3)(B)(i) (emphasis added). The text makes clear that while the commission of actual physical harm may be sufficient to bring an alien within the persecution exception, it is not necessary. *See Singh v.* Gonzales, 417 F.3d 736, 740 (7th Cir. 2005) (alien assisted or participated in persecution where he helped bring religious minorities into custody and was aware that they were physically abused). Our conclusion that persecution is not limited to physical harm finds support in the corpus of circuit law interpreting the identical language in the Holtzman Amendment, which denies relief to former Nazis who "ordered, incited, assisted, or otherwise participated in" persecution. 8 U.S.C.A. § 1182(a)(3)(E)(i); see, e.g., *Negele* v. *Ashcroft*, 368 F.3d 981, 983-84 (8th Cir. 2004) (actual participation in physical atrocities unnecessary for finding that alien engaged in persecution); *Naujalis v. INS*, 240 F.3d 642, 646 (7th Cir. 2001) (government need not show that alien "personally participated in the atrocities"); *Hammer v. INS*, 195 F.3d 836, 843 (6th Cir. 1999) (same).

In this case, the IJ determined Higuit was aware that his information-gathering and infiltration led to the torture, imprisonment, and death of NPA members and other political opponents, as well as individuals merely suspected of affiliation with these groups. This brutality was the result of the information Higuit covertly gathered and provided to his superiors over a period of approximately ten years. *See Singh*, 417 F.3d at 740 (length of involvement relevant to whether alien assisted or participated in persecution). Under these circumstances, the IJ properly determined that Higuit did assist or otherwise participate in persecution. While "a distinction must be made between genuine assistance in persecution and inconsequential association with persecutors," id. at 739, there can be no dispute over Higuit's personal culpability in this case.

IV.

For the foregoing reasons, we dismiss the appeal in part and affirm the judgment of the BIA in part.

DISMISSED IN PART AND AFFIRMED IN PART

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
February 28, 2006

No. 05-1002
A72-792-749

LUIS A. HIGUIT
Petitioner

v.

ALBERTO R. GONZALES, Attorney General
Respondent

ORDER

Appelant has filed a petition for rehearing.

The Court denies the petition for rehearing.

Entered for a panel composed of Judge

Widener, Judge Wilkinson, and Judge Traxler.

For the Court – By Direction

/ s / Patricia S. Connor

CLERK